

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 282 of 1987

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL  
and  
HON'BLE MR.JUSTICE M.C.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the concerned : NO  
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

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STATE OF GUJARAT

Versus

RAJNIKANT N HIRANI  
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Appearance:

MS PAURAMI B SHETH, APP for Appellant  
MR RN SHAH for Respondents No. 1-3  
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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL  
and  
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 19/10/2004

ORAL JUDGEMENT

By filing this appeal under Section 378 of the Code of Criminal Procedure, 1973, the State of Gujarat has questioned legality of judgment dated January 13, 1987 rendered by the learned Additional Sessions Judge, Bhavnagar in Sessions Case No.52 of 1986 by which the respondents have been acquitted of the offence punishable under Section 302 read with 34 of I.P.C.

2. The facts emerging from the record of the case are as under:

2.1 An anonymous application was received by Mr. Gurudayal Singh who was then D.S.P., Bhavnagar making allegations that the respondents no.1 and 2 as well as one Kalu Pathan and Mahendra Mochi were indulging in bullying and eve-teasing and were threatening to kill those who were protesting and, therefore, appropriate action should be taken against them. That application was forwarded to Bhavnagar 'B' Division Police Station for necessary action which was received on December 26, 1985. On receipt of the said application, it was handed over to Mr. K.J. Chauhan who was then P.S.I. of 'B' Division Police Station, Bhavnagar for investigation. Mr. Chauhan asked Police Constable Pravinsinh to summon those persons at the police station against whom the application was filed. Accordingly, Police Constable Pravinsinh met the respondent no.1 and asked him to report at 'B' Division Police Station alongwith three others. However, the respondent no.1 failed to report at the Police Station with others on January 2, 1986 and, therefore, the police constable was again asked to summon those persons who were named in the anonymous application. Accordingly, Police Constable Pravinsinh again attempted on January 3, 1986 to contact the persons who were named in the anonymous application, but those persons could not be traced. Accordingly, an oral report was submitted by Police Constable Pravinsinh before Mr. Chauhan who, in turn, submitted a report dated January 6, 1986 to the Police Inspector of Bhavnagar 'B' Division Police Station. The respondents entertained a doubt that the anonymous application was addressed by deceased Balwantrai Chuhamal who was running a grocery shop as well as fair price shop at Bhavnagar, as a result of which they were summoned at Bhavnagar 'B' Division Police Station. Therefore, they started harassing him.

2.2 The incident in question took place on January 3, 1986. On the day of incident, at about 1.00 p.m., the deceased asked his wife Ushaben to accompany him to

Ghogha Circle to look for another house. Ushaben tried to know from the deceased as to why he was looking for another house and she was informed by the deceased that the respondents were entertaining doubt that an anonymous application was submitted against them by him and that they were harassing him. After inspecting one or two buildings, the deceased returned home in the company of his wife and thereafter, went to attend his shop. After some time, Khumansinh, who was employed by the deceased as a peon, came to the house of the deceased and informed wife of the deceased that two Bharwads were sitting in the shop of Balwantraai and were quarrelling with him and, therefore, tea should be prepared for them immediately. Tea was accordingly prepared by Ushaben which was sent to the shop through younger daughter of one Chandu who was neighbour of the deceased. Thereafter, Ushaben sent woollen pullover for Balwantraai through wife of Chandu. The wife of Chandu also, after coming back, informed wife of the deceased that two Bharwads were sitting in the shop. At about 8.00 p.m., Ushaben went to the shop of her husband as she had to collect her petticoat from house of wife of her nephew which is situated just behind the shop. After reaching the shop, she informed her husband that it was necessary for her to collect the petticoat but she was asked by the deceased not to go to the house of nephew saying that Khumansinh would collect it. It was also found by her that at that time, her two daughters as well as Lalchand Master and Chetan Master were also sitting in the shop. The deceased asked Ushaben to go home with daughters and informed her that after closing the shop, he was also coming home. Accordingly, Ushaben went home with her two daughters. After reaching home, she switched on T.V. and was watching 'Chitrahaar' programme. At that time, Chetan Master, who was looking frightened, came to her house and asked her not to go out as his brother (the deceased) was being beaten by three Bharwads. Chetan Master also informed Ushaben that the deceased was lying near the bus stand. On receiving this information, Ushaben immediately left her house and started running towards the bus stand and found that her husband was sitting on the ground with one hand resting on the waist and another on the head near the bus stand. She made enquiry with her husband as to who caused injuries to him and thereupon, the deceased asked her to summon a rickshaw, and informed her that Rajnikant (original accused no.1 respondent no.1) with knife whereas Jasa (original accused no.3 - respondent no.2) with dharia and Bhopa (original accused no.2 respondent no.3) caused injuries to him. Thereafter, Ushaben attempted to stop a rickshaw but none stopped and, therefore, she went running towards

her house as her neighbour Chandu was maintaining a tempo. Chandu was asked to come near the bus stand with tempo and, therefore, Chandu made arrangements for bringing a tempo to the place where the deceased was sitting in an injured condition. After asking Chandu to make arrangement for tempo, Ushaben left for the place where her husband was sitting in an injured condition where Khumansinh also came. In presence of Khumansinh, Ushaben tried to know from him as to who assaulted him, but the deceased could not speak and fell down. Meanwhile, Chandu arrived with tempo at the place where the deceased fell down. Ushaben's father and Pushpaben also arrived in a rickshaw. Thereafter, Khumansinh removed the deceased to Sir Takhtasinhji Hospital, Bhavnagar for treatment in Chandu's tempo whereas Ushaben with her father and Pushpaben followed the tempo in a rickshaw. Dr. Bhanushanker Joshi, who was then on duty at the hospital, examined the deceased and declared him dead. On hearing this, Ushaben became mentally disturbed and she was stunned.

2.3 At about 8.45 p.m. on January 3, 1986, Mr. B.R. Simpi, who was then P.I. of Bhavnagar 'B' Division Police Station, received an information from Constable Harichandra Mahipatsinh that Balwantraai was lying in a bleeding condition near the bus stand. On receipt of information, he immediately went with other police personnel to the bus stand. At the bus stand, he found that there was a crowd of 50 persons but Balwantraai Chuharmal was not there. He saw a pool of blood there, and on enquiry, he learnt that Balwantraai was removed to Government hospital for treatment. After posting one constable to protect the place, he went to the hospital where he was informed by Duty Head Constable that Balwantraai had died. Mr. Simpi made arrangements for sending the dead body of the deceased to post-mortem room. Autopsy on dead body of the deceased was performed on January 4, 1986 by Dr. Joshi. It was learnt by Mr. Simpi that a person named Khumansinh had gone to the police station for lodging F.I.R. Therefore, he went to police station and recorded First Information Report of Khumansinh, as narrated by him. The First Information Report was sent for registration and after registration of offences, the same was handed over to Mr. Simpi for further investigation. He, thereafter, went to Bharatnagar but could not trace the accused. On January 4, 1986, he made an attempt to record police statement of Chetanmal but it was found by him that Chetanmal was suffering from fever and severe headache, as a result of which his police statement could not be recorded. In the morning of January 4, 1986, Mr. Simpi drew panchnama of

the place of incident and seized control earth, chappals of the deceased, handle of sword etc. from the place of incident. From there, he went to hospital and held inquest on the dead body of deceased Balwantrao. On the same day, he recorded police statements of Ushaben Balwantrao, Chetankumar N Manglani, Laxmanbhai Damjibhai Vanand, Mansukhbhai etc. On January 5, 1986, he recorded statements of Mahipatsinh Ranubha, Prabhatbha Mahipatsinh etc. On January 6, 1986, at about 3.00 p.m., the respondent no.1 surrendered before the police and, therefore, his arrest panchnama was prepared in presence of panch witnesses. It was found by Mr. Simpi that an injury was sustained by the respondent no.1 on his left hand over which a bandage was applied and, therefore, an enquiry was made as to how the injury was sustained and in reply to the same, the respondent no.1 informed Mr. Simpi that injury was caused to him by the respondent no.3. It was also noticed by Mr. Simpi that the T-shirt and pant put on by the respondent no.1 were blood-stained and, therefore, they were seized under a panchnama. An information was received by Mr. Simpi that the respondents no.2 and 3 were near Valand Society and, therefore, they were arrested in presence of panch witnesses regarding which a panchnama was prepared. The respondent no.1 lodged a complaint against respondent no.3 for commission of offence punishable under Sections 323 and 324 of I.P.C. which was also investigated by P.I. Mr. Simpi. While in police custody, the respondent no.1 made a disclosure statement on January 7, 1986 pursuant to which, knife used by him in commission of offence was discovered from a pip i.e. cylindrical upright vessel of metal kept in his house. The knife discovered was found to be blood-stained. Therefore, it was seized under a panchnama. Similarly, pursuant to disclosure statement made by the respondent no.3 on January 7, 1986, sword without handle used by him in commission of offence, as well as white 'chorni' and white shirt were discovered from a place which was near the bank of the river. All the three articles recovered were blood-stained and, therefore, seized under a panchnama. On January 7, 1986 itself, the Investigating Officer recorded statements of Dr. Rahemtullah B. Ratnani, Chandumal Mayamal, Kamlaben Paherumal, Anilkumar Chetumal etc. and also received post-mortem notes. While in police custody, the respondent no.2 made a disclosure statement on January 8, 1986 pursuant to which, dharia used by him in commission of offence as well as shirt and chorno i.e. pyjamas were discovered from a waste land. The articles discovered were blood-stained and, therefore, seized under a panchnama. The incriminating articles seized during the course of

investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, the respondents were chargesheeted in the court of learned Judicial Magistrate, First Class, Bhavnagar for commission of offence punishable under Section 302 read with 34 of I.P.C. As the offence punishable under Section 302 I.P.C. is exclusively triable by a Court of Sessions, it was committed to Sessions Court, Bhavnagar for trial where it was numbered as Sessions Case No.52 of 1986.

3. The learned Additional Sessions Judge, Bhavnagar, to whom the case was made over for trial, framed charge against the respondents at Exh.3 for commission of offence punishable under Section 302 read with 34 of I.P.C. The charge was read over and explained to the respondents who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Khumansinh Jatubha as p.w.1 at Exh.19, (2) Chetanbhai Namamil as p.w.2 at Exh.20, (3) Mahipatsinh Ranubha as p.w.3 at Exh.22, (4) Ushaben Chetumal as p.w.4 at Exh.25, (5) Rahemtullah Bahadurali Ratnani as p.w.5 at Exh.26, (6) Pushpaben Nanchandbhai as p.w.6 at Exh.27, (7) Chandumal Mayamal as p.w.7 at Exh.28, (8) Bhupatbhai Jadavbhai as p.w.8 at Exh.30, (9) Dahyabhai Punambhai Patel as p.w.9 at Exh.31, (10) Subhash Chabildas as p.w.10 at Exh.32, (11) Ranjit Himatrai Dave as p.w.11 at Exh.33, (12) Dr. Bhanushanker Kantishanker Joshi as p.w.12 at Exh.35, (13) Ajitbhai Ismailbhai as p.w.13 at Exh.37, (14) Haresh Vinodrai as p.w.14 at Exh.38, (15) Aniruddhsinh Sardarsinh as p.w.15 at Exh.39, (16) Nanjibhai Lakhabhai as p.w.16 at Exh.40, (17) Bharatbhai Dhanvantraai Bhatt as p.w.17 at Exh.41, (18) Gopal Vamanbhai as p.w.18 at Exh.42, (19) Pravinsinh Jamsinh Chudasma as p.w.19 at Exh.44, (20) Kesarisinh Jalamsinh Chauhan as p.w.20 at Exh.45 and (21) Bhaskarrav Ramdas Simpi as p.w.21 at Exh.47, to prove its case against the respondents. The prosecution also produced documentary evidence such as panchnama indicating seizure of clothes of the deceased at Exh.11, post-mortem notes of the deceased at Exh.12, anonymous application submitted to D.S.P., Bhavnagar at Exh.13, complaint of Dineshkumar Jeshankar Pandya against the respondent no.3 and three others for commission of offence punishable under Sections 307, 143, 147, 148, 149, 326, 188 of I.P.C. and Section 135 of the Bombay Police Act at Exh.15, report of the Serologist at Exh.18, complaint of Khumansinh at Exh.60, application dated January 4, 1986 made by witness Chetankumar N. Manglani to Police Inspector 'B' Division Police Station, Bhavnagar stating that the respondents no.2 and 3 and another unknown person assaulted the deceased on January 3, 1986 at Exh.21, panchnama of place

of incident at Exh.29, map of place of incident at Exh.43, arrest panchnama of respondent no.1 at Exh.48, arrest panchnama of respondents no.2 and 3 at Exh.49, complaint of respondent no.1 against respondent no.3 at Mark P/2, panchnama indicating discovery of knife pursuant to disclosure statement made by respondent no.1 at Exh.50, panchnama of discovery of dharia pursuant to disclosure statement made by the respondent no.3 at Exh.51, panchnama of discovery of sword pursuant to disclosure statement made by the respondent no.2 at Exh.52, another map of place of incident at Exh.56, compromise purshis arrived at in the case which was registered pursuant to complaint of the respondent no.1 against the respondent no.3 at Exh.59 etc. in support of its case against the respondents.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the respondents the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the case of the respondents was that they were innocent. However, no evidence was adduced by any of the respondents to establish that the respondents were innocent and not connected with the incident in question.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Balwantraai Chuhamal died a homicidal death. The learned Judge noticed that witness Khumansinh Jatubha, witness Chetanmal Namamil and panch witnesses did not support the prosecution case. The learned Judge, thereafter, considered the testimony of Ushaben Chetumal who is wife of the deceased and held that her case that the deceased had made oral dying declaration before her involving the respondents was not reliable. It was further deduced by the learned Judge that evidence regarding discovery of weapons, pursuant to disclosure statements made by the respondents, was not reliable as panch witnesses did not support the prosecution case. In view of these findings, it was concluded by the learned Judge that it was not established by the prosecution that, in furtherance of common intention of all the respondents, murder of the deceased was committed. Therefore, the learned Judge has acquitted the respondents by judgment dated January 13, 1987 giving rise to instant appeal.

6. Ms. P.B. Sheth, learned APP argued that the evidence tendered by the prosecution regarding oral dying declaration made by the deceased before his wife is

trustworthy, cogent as well as consistent and, therefore, the learned Judge of the Trial Court was not justified in brushing aside the same. According to the learned APP, on learning from Chetanbhai that her husband was assaulted by Bharwads, witness Ushaben who is wife of the deceased, went running towards the bus stand and found that her husband was sitting with one hand resting on his waist and another on his head and that, on enquiry being made, the witness was informed by the deceased that he was assaulted by the respondents and, therefore, the learned Judge was not justified in disbelieving the oral dying declaration made by the deceased. What was maintained by the learned counsel of the State Government was that the testimony of witness Ushaben does not suffer from any serious infirmity in the sense that no major or material contradictions or omissions have been brought on record by the defence with reference to her earlier police statement and, therefore, her testimony should have been accepted by the learned Judge. It was argued that the inference drawn by the learned Judge that on receipt of 47 injuries, the deceased must have lost consciousness and must not have been in a position to make any statement is against the weight of the positive evidence of witness Ushaben and the claim of Ushaben that the deceased had made oral dying declaration before her implicating all the respondents should have been relied upon, more particularly, when the medical evidence does not indicate that the deceased must have lost consciousness on receipt of 47 injuries. According to the learned APP, the learned Judge of the Trial Court was not justified in disbelieving the discovery evidence tendered by the prosecution on specious plea that the panch witnesses did not support the same and it was argued that discovery of different weapons and clothes, pursuant to disclosure statements made by the respondents, stands amply proved by the reliable testimony of the Investigating Officer which also lends support to the testimony of witness Ushaben. It was argued that find of same group of blood on the weapons discovered as well as on the clothes of the respondents would indicate that they were in close proximity of the deceased when he was fatally wounded and, therefore, this circumstance should have been treated as lending corroboration to the testimony of witness Ushaben. What was asserted by the learned APP was that the findings recorded by the learned Judge of the Trial Court are not only perverse but against the weight of the evidence on record and as the only conclusion, which is possible in the facts of the case, is that the common intention of the respondents was to cause death of the deceased, and in furtherance of said intention, death of the deceased

was caused, the appeal should be allowed and the respondents should be convicted of the offence with which they were charged.

7. Mr. R.N. Shah, learned senior counsel for the respondents contended that Ushaben in her police statement did not refer to the fact that at the instance of her deceased husband, she had accompanied him to Ghogha circle and seen one or two houses and that, on enquiry, she was informed by her husband that he was looking for another house as he was threatened by the respondents and in view of this material omission, the learned Judge of the Trial Court who had the advantage of observing demeanour of the witnesses was justified in disbelieving her testimony. According to the learned counsel of the respondents, the fact that the deceased sustained 47 injuries on different parts of his body would show that he must have lost consciousness within no time and, therefore, no error was committed by the learned Judge of the Trial Court in disbelieving the claim of witness Ushaben that the deceased had made oral dying declaration implicating the respondents. It was emphasised by the learned counsel of the respondents that as per the prosecution case, deceased Balwantrao Chuharmal was assaulted when he was pulling down the shutter of his shop but he was found in an injured condition near the bus stand which is not explained by the prosecution and, therefore, the learned Judge of the Trial Court was justified in disbelieving the testimony of Ushaben. The learned counsel for the respondents argued that the evidence tendered by the prosecution regarding discovery of weapons and clothes, pursuant to so-called disclosure statements made by the respondents, is not satisfactory at all and, therefore, rightly disbelieved by the learned Judge of the Trial Court. It was argued that find of same group of blood as that of the deceased on the weapons and clothes of the respondents allegedly discovered would not indicate, in any manner, that they were in close proximity of the deceased when he was fatally wounded and, therefore, the impugned judgment should be upheld. It was emphasised that the view taken by the learned Judge of the Trial Court is possible having regard to the nature of evidence led by the prosecution and as the same is neither perverse nor contrary to the evidence on record, the appeal should be dismissed.

8. This court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case. The court is aware

of the fact that it is dealing with an acquittal appeal. However, the scope of an acquittal appeal is well-defined by a catena of decisions of the Supreme Court. In appeal against acquittal, the powers of the High Court are not different from its powers in an ordinary appeal against conviction. The Appellate Court has full power to review an order of acquittal and to come to its own conclusion in appeal against the acquittal. The only requirement that the Appellate Court must observe is that while dealing with an order of acquittal, the Appellate Court should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the Trial Court in support of its order of acquittal but it should also express its reasons in its judgment which lead it to hold that the order of acquittal is not justified. The Appellate Court is also required to bear in mind that the Trial Court has the opportunity of witnessing the demeanour of witnesses while in the witness-box and moreover, the presumption of innocence is not weakened by the order of acquittal and, therefore, if two reasonable conclusions can be reached on the basis of the evidence on record, the Appellate Court shall not disturb the finding of the Trial Court. The additional burden which is placed on the High Court is that it has to consider each of the grounds which has prompted the Trial Court to pass the order of acquittal and to record its own reasons for not agreeing with the Trial Court.

9. Having noticed the scope of this acquittal appeal, this court proposes to consider the evidence adduced by the prosecution against the respondents.

10. The fact that deceased Balwantrao Chuharmal died a homicidal death is not in dispute. It is not argued by the learned counsel of the respondents before this court that deceased Balwantrao did not die a homicidal death. Though complainant Khumansinh - p.w.1 (Exh.19) has turned hostile, he has stated that when he was at a distance of 150 to 200 feet from the shop of the deceased, he had heard shouts and seen that the deceased was assaulted. The injuries sustained by the deceased are also mentioned in the inquest report produced by the prosecution at Exh.8 on the record of the case. The testimony of Dr. Bhanushanker Joshi (p.w.12) recorded at Exh.35 indicates that he was Medical Officer attached to Sir Takhtasinhji Hospital at Bhavnagar and received dead body of the deceased Balwantrao on January 3, 1986 for post-mortem examination. According to him, the deceased was first examined by Dr. H.K. Parekh who was on duty as Medical Officer at that time and the dead body of the deceased was handed over to him for post-mortem examination on

January 4, 1986. It is stated by this witness that the post-mortem examination was commenced at 11.20 a.m. and completed at 1.00 p.m. The Medical Officer, in his substantive evidence before the court, has mentioned external as well as internal injuries which were noticed by him while performing autopsy on the dead body of the deceased. They are as under:

External Injuries:

- i) Vertical incised wound over the middle of the forehead 2"L x 1/4"B x bone deep.
- ii) Vertical incised wound over right side parietal region 2"L x 1/4"B x bone deep.
- iii) Vertical incised wound over left side parietal region 2"L x 1/4"B x bone deep.
- iv) Vertical incised wound over left side parietal region 1" to the left side of median plane parallel to injury No.3. size 2 1/2"L x 1/4"B x bone deep.
- v) Incised wound over left side occipital region 1-1/2"L x 1/4"B x bone deep.
- vi) Incised wound over left side post. auricular region 1/2"L x 1/6"B x skin deep.
- vii) Oblique incised wound over right axillary fold 1"L x 1/4"B x muscle deep.
- viii) Scratched vertical incised wound over posterior aspect of right upper arm 5"L.
- ix) Scratched transverse incised wound over post. aspect of right arm lower half 5"L.
- x) Scratched transverse incised wound 1 1/2" below injury No.9 and parallel to it 4 1/2"L.
- xi) Transverse scratched incised wound over posterior aspect of right forearm 2"L at the junction of upper 1/4 and lower 3/4.
- xii) Transverse scratched incised wound over posterior aspect of lower part of right forearm at the junction of upper 3/4 and lower 1/4.
- xiii) Oblique scratched incised wound over middle part of right forearm 2"L.
- xiv) Incised wound over medical side of dorsum of right hand 2"L x 1/4"B muscles cut with fracture of 5th meta carpal bone.
- xv) Amputation at the base of little finger of right hand skin flap slightly attached.
- xvi) Transverse incised wound over middle phalanx of right ring finger 1/2"L x 1/4"B with fracture of middle phalanx.
- xvii) Incised wound over medial side of right index finger 1/2"L x 1/4"B x fracture of terminal phalanx.
- xviii) Transverse incised wound over middle part of palm

- of right hand over medial side 2"L x 1/4"B x muscle deep.
- xix) Scratched oblique incised wound across the palm of right hand 3"L.
- xx) Vertical incised wound over front of lower part of medial side of right wrist, 1/2"L x 1/4"B x muscle deep.
- xxi) Transverse incised wound over right wrist anterior aspect 1"L x 1/4"B x muscle deep.
- xxii) Vertical incised wound over anterior aspect of lower part of right forearm 3/4"L x 1/2"B x muscle deep.
- xxiii) Oblique incised wound 2" to the right side of right nipple situated in 4th right intercostal space 1/2"L x 1/4"B x cavity deep.
- xxiv) Vertical incised wound 5" below above injury 1/2"L x 1/4"B x cavity deep.
- xxv) Transverse incised wound 3" below right nipple situated in 6th right intercostal space 3"L x 1/4"B x cavity deep.
- xxvi) Transverse scratched incised wound over right side chest right anterior axillary line 3rd right intercostal space 1"L x 1/6"B x skin deep.
- xxvii) Vertical incised wound over back of abdomen right renal angle 1"L x 1/2"B x cavity deep.
- xxviii) Oblique incised wound in right iliac fossa 7" to the right side of umbilical 1"L x 1/4"B x cavity deep.
- xxix) Oblique incised wound left side chest 4" below left nipple in 7th left intercostal space 1"L x 1/4"B x cavity deep.
- xxx) Two oblique incised wounds over lower part of chest on left side anterior axillary line 1"L x 1/4"B x muscle deep situated in left 7th intercostal space.
- xxxi) Transverse incised wound over lower part of right side chest posterior axillary line 1"L x 1/4"B x muscle deep.
- xxxii) Vertical incised wound over right lumbar region 1"L x 1/2"B x cavity deep.
- xxxiii) Transverse incised wound over left midaxillary line in 6th left intercostal space 1"L x 1/4:B x cavity deep.
- xxxiv) Oblique incised wound over left anterior axillary line in 5th left intercostal space 1"L x 1/4"B x cavity deep.
- xxxv) Two transverse incised wound over left lumbar region 1"L x 1/4"B x cavity deep.
- xxxvi) Oblique incised wound over lower part of left arm ant. aspect 1"L x 1/4"B x muscle deep.
- xxxvii) Oblique incised wound over anterior aspect of

- left forearm 1"L x 1/4"B x muscle deep at the junction of upper 1/4 and lower 3/4.
- xxxviii) Transverse incised wound over medical side of lower part of left forearm at the junction of upper 3/4 and lower 1/4. size 2"L x 1/4"B x bone deep.
- xxxix) Transverse incised wound over the proximal part of left little finger 1"L x 1/4"B x fracture of proximal phalanx.
- xl) Oblique incised wound over lower part of left forearm posterior aspect at the junction of upper 2/3 and lower 1/3 size 1 1/2"L x 1/4"B x muscle deep.
- xli) Oblique incised wound over middle part of left forearm posterior aspect size 1"L x 1/4"B x muscle deep.
- xl ii) Vertical incised wound over upper part of post. aspect of left forearm at the junction of upper 1/4 and lower 3/4 size 1"L x 1/4"B x bone deep.
- xl iii) Vertical incised wound over posterior aspect of left elbow 1"L x 1/4"B x bone deep.
- xl iv) Oblique incised wound over lateral aspect of upper part of left thigh 1"L x 1/4"B x muscle deep.
- xl v) Transverse incised wound over lower part of medial side of left thigh 1"L x 1/4"B x muscle deep.
- xl vi) Transverse incised wound 2" below left knee joint 1"L x 1/4"B x muscle deep.
- xl vii) Transverse incised wound over anterolateral aspect of left leg 3"L.

#### Internal Injuries:

- i) Blood clots in 6th left intercostal muscle corresponding to external injury No.33.
- ii) Collection of blood in the thoracic cavity on left side.
- iii) Corresponding to external injury No.33, incised wound going deep and piercing the posterior surface of lower lobe of left lung going deep into the parenchyma of left lung.
- iv) Collection of blood in the peritoneal cavity. This was corresponding to external injury No.29 incised wound going deep and piercing the lesser curvature of stomach.
- v) Corresponding to external injury No.35 - incised wound going deep and piercing the proximal part of ileum through and through.
- vi) Corresponding to external injury No.28 - incised wound going deep and piercing the ascending

colon.

- vii) Corresponding to external injury No.27, incised wound piercing the lower pole of right kidney through and through.

The evidence of Medical Officer gets ample corroboration from contemporary document prepared by him namely, the post-mortem notes produced by the prosecution at Exh.12. The numerous injuries noticed above make it clear that more than two persons had assaulted the deceased and this was not handiwork of one or two persons. It is nobody's case that the deceased sustained above referred to injuries in an accident or that those injuries were self-inflicted. Under the circumstances, this court finds that the finding recorded by the learned Judge of the Trial Court that it was proved by the prosecution beyond reasonable doubt that the deceased died a homicidal death is eminently just and is hereby upheld.

11. As noticed earlier, Khumansinh Jatubha lodged First Information Report but he has not supported the prosecution case at all. Though he has stated in his testimony before the court that he informed Ushaben that deceased Balwantrao was injured and, therefore, Ushaben went to the shop and that he lodged First Information Report at the police station, he has not stated in his substantive evidence before the court that he witnessed the incident or saw that the deceased was assaulted by the respondents or any of them. It is true that he was permitted to be cross-examined by the learned APP and confronted with his complaint. However, he has denied most of the averments made by him in his complaint. The suggestion made by the learned APP to him that he was falsely deposing before the court because of fear of the respondents was denied by him. In cross-examination by the learned counsel of the respondents, it is stated by this witness that when he had seen the injuries on the deceased, the deceased was in an unconscious state and at that time, Ushaben was present. A fair reading of the testimony of witness Khumansinh makes it evident that he has turned hostile and, therefore, his evidence is of little assistance to the prosecution.

12. So also, witness Chetanbhai Namamil examined by the prosecution as p.w.2 at Exh.20 has also turned hostile to prosecution, though in paragraph 9 of his testimony, he admitted that he was deposing falsely out of fear of the respondents and that he was the author of application dated January 4, 1986 submitted before Police Inspector, 'B' Division Police Station, Bhavnagar. Further, paragraph 7 of his testimony would indicate that

it was stated by this witness in his police statement that Balwantrai had pulled down shutter of the shop and at that time, he was standing at a distance of 10 steps from him and all of a sudden, three persons had come running from the direction of Khasia paan house out of whom, two were dressed as Bharwad whereas the third had put on yellow-coloured shirt and that they were armed with dharia, sword and they had assaulted Balwantrai and before he could understand anything, the person who had dharia with him had caused injury on deceased Balwantrai, as a result of which he had started running and on looking back, found that the respondent no.3 was one of the persons who was involved in the assault on the deceased whereas the deceased was asking one of the assailants not to beat him by saying that "Jasabhai don't beat me" and thereafter, he had gone to the house of Mahipatsinh and informed Mahipatsinh and his wife about the fact that Balwantrai was assaulted and he had also gone to inform Ushaben about the incident. However he has not stated that the facts so stated in his police statement were true. Thus, statement made by this witness in paragraph 7 of his deposition also does not help the prosecution at all because the statement made by the witness in his police statement can never be regarded as substantive evidence before a court of law and no conviction can be based relying upon a part of police statement. The testimony of witness Chetanbhai Namamil is also, therefore, of no help to the prosecution.

13. This brings the court to consider the testimony of witness Ushaben Chetumal who was examined as p.w.4 at Exh.25. This witness has mentioned before the court that Balwantrai Chuharmal was her husband and her marriage with the deceased had taken place before six years of the incident. It is stated by this witness that during the subsistence of the marriage, she had given birth to three daughters, eldest of whom was aged 5 years and the younger to her was aged 3 years whereas the youngest was aged 2 years at the time of the incident. According to this witness, her husband was running a provision store as well as a fair price shop in Bhavnagar and the shop was situated at a distance of 400 to 500 feet from her house. It is also mentioned by the witness that her husband had employed Khumansinh as a shop assistant. The witness has maintained before the court that her husband was keeping the shop open from 8.00 a.m. to 12.00 noon and from 4.00 p.m. till 9.00 p.m. According to her, on the date of incident, at about 1.00 p.m., her husband had closed the shop and after coming home, asked her to accompany him to Ghogha circle to look for a residential accommodation. According to this witness, she had made

enquiry with her husband as to why he was looking for another residential accommodation and her husband had replied that as an anonymous application was made against the respondents, the respondents were entertaining a doubt that the anonymous application was made by him and, therefore, they were harassing him. It is mentioned by this witness that after looking over one or two houses, they had come back at about 5.00 p.m. and thereafter, her husband had gone to attend the shop. According to this witness, Khumansinh had come to her house and informed her that two Bharwads were sitting in the shop and were quarreling with Balwantraai and, therefore, tea should be sent for them immediately. The witness has stated that after Khumansinh had left her house, she had prepared tea within ten minutes and sent the same through younger daughter of Chandu who is her neighbour. The witness has mentioned that thereafter, she had sent woollen pullover to the shop through wife of Chandu and after coming back, wife of Chandu had informed her that two Bharwads were sitting in the shop. What is mentioned by this witness before the court is that at about 8.00 p.m., she had gone to the shop as she had to collect petticoat from wife of her nephew whose house is situated just behind the shop. It is mentioned by this witness that she had informed her husband that she was going to the house of wife of her nephew to collect the petticoat but she was prevented from going to the house of her nephew by her husband saying that the same would be collected through Khumansinh. It is further mentioned that she had found that her two daughters as well as Lalchand Master and Chetan Master were also present in the shop. According to her, she had asked her husband to close the shop and go home but her husband had asked her to take the two daughters home and informed her that he would come after closing the shop. It is further mentioned by this witness that thereafter, she had gone home with daughters and switched on T.V. and was watching 'Chitrahaar' programme which was being telecast at that time. It is further mentioned by the witness that at that time, Chetan Master had come to her house and he was looking frightened. It is mentioned by this witness that she had made enquiry as to why he was frightened and she was informed by Chetan Master that his brother (the deceased) was being assaulted by three Bharwads and that he was lying near the bus stand. According to this witness, she was also told by Chetan Master not to go out of the house but on learning about the assault on her husband, she had gone running towards the bus stand and found that her husband was sitting with one hand resting on the waist and another on the head. What is asserted by this witness before the court is that

she had made enquiries with her husband as to who had assaulted him and her husband had asked her to bring a rickshaw and informed her that he was assaulted by the respondent no.1 with a knife, the respondent no.2 with a dharia and also by respondent no.3. According to this witness, she had attempted to stop a rickshaw without success and, therefore, had gone running to her house and asked Chandu to bring tempo at the place where the deceased was found sitting near the bus stand. It is further stated by this witness that thereafter, immediately she had gone to the place where her husband was sitting and that at that time, Khumansinh had also arrived at the said place and again, in the presence of Khumansinh, she had asked her husband as to who had assaulted him but her husband had not replied and had fallen down. According to this witness, when tempo of Chandu had arrived at the place, her father and Pushpaben had also arrived in a rickshaw and thereafter, Khumansinh had removed her injured husband to hospital in Chandu's tempo whereas she, in the company of her father and Pushpaben, had followed the tempo in a rickshaw. What is maintained by this witness before the court is that after examining her husband, the doctor had declared him dead and, therefore, she had got mentally disturbed and was stunned. According to this witness, somebody had made an application against the respondents but the respondents were entertaining a doubt that the said application was made by her husband. It is stated by the witness that her husband was literate but the anonymous application produced by the prosecution at Exh.13 was not written by her husband. It is also mentioned by the witness that the house situated in Bharatnagar was owned by them whereas the shop was taken by her husband from Housing Board. According to her, the distance between the place where her husband was found sitting near the bus stand was at a distance of 400 to 500 feet from her house whereas the said place was at a distance of 150 to 200 feet from the shop. It is also mentioned by the witness that there were about 12 shops near the shop of her husband and that Bharatnagar is a thickly populated area.

13.1 In her cross-examination, it is stated by the witness that they had reached hospital at about 8.45 p.m. or 9.00 p.m. According to her, her husband was first of all removed to operation theatre, and she was not knowing the name of the doctor who had declared her husband dead. According to her, till the dead body of her husband was brought home, she was mentally disturbed and that the dead body of her husband was brought home on the next day. According to her, when mourners had come back after cremating the dead body of her husband, it was night

time. It is also asserted by her that no one was present when her police statement was recorded. It was explained by her that the police had stayed at her house for about half an hour to record her police statement. According to this witness, after her police statement was recorded, it was read over to her. The witness has admitted that near the shop of her husband, there is a flour mill as well as dispensary of Dr. Rameshbhai Waghela and that just behind her house, there are shops which were remaining open till 8.30 p.m. It is mentioned by this witness that the cabins situated opposite the bus stand were also remaining open till 8.00 p.m. and that house of Khumansinh is situated in the first turning on the left while coming to the bus stand from her house and he was residing near house of Mahipatsinh. According to her, when she had gone to the place where her husband was, at that time, several persons had collected but the shops were closed. It was also asserted by her that the place where her husband was found sitting near the bus stand, was not dark but there was light coming from an electric pole and there was also moonlight. It is mentioned by this witness in her cross-examination that when she had gone near her husband, there were about 20 to 25 persons whereas 10 to 12 persons were present when she had talked with her husband but she was not knowing any of them. The cross-examiner had tried to know from this witness as to whether those 10 to 12 persons were of her locality or not but it was stated by the witness that the circumstances prevailing at that time were such that she was not able to notice as to whether those persons were belonging to her locality or not. It is further mentioned by this witness in her cross-examination that when she had gone near her husband, at that time, Chetan Master was with her but she was not able to remember whether Chetan Master was present when she had talked with her husband. It was asserted by this witness that her husband was speaking in low voice but was audible and she had sat quite near her husband. According to her, she had stayed with her husband for about 2 to 3 minutes and that she had seen that her husband was resting one of the hands on waist and another on the head and that her hands were also stained with blood whereas the shawl which she was wearing had also become blood-stained. The cross-examiner had tried to know from this witness as to whether she had pointed out blood-stained shawl to the police and it was replied by the witness that on the night of the incident, it was very cold and, therefore, while going to hospital, she had lent the shawl to Raju who is son of her sister-in-law. It was also mentioned by this witness that her husband was talking with her haltingly and those 10 to 12 persons who were standing

near her husband had not asked any question to her husband. The suggestion made by the defence that the deceased had become unconscious and was not in a position to speak was emphatically denied by her. The further suggestion made by the defence that she was deposing falsely before the court that her husband was able to speak was also emphatically denied by her. The suggestion made by the defence that she was falsely deposing regarding talk which she had with her husband was also denied by her. According to her, she was not remembering as to whether she had stated in her police statement that she had asked her husband as to why he was going to Ghogha circle in search of another house and that, in reply thereto, her husband had informed her that someone had made an anonymous application against the respondents and that the respondents were harassing him on entertaining a doubt that the anonymous application was made by him. It was admitted by her that it was not stated by her in her police statement that Khumansinh was deputed by her husband to her house to bring tea and that Khumansinh had informed her that two Bharwads were sitting in the shop and were quarrelling with the deceased and, therefore, tea should be sent for them immediately. The cross-examiner had put to the witness that she had not stated that three Bharwads were beating Balwantraai and in answer thereto, it was stated by the witness that Chetan Master had informed her that three persons were beating her husband. According to this witness, Kamla, who is wife of Chandu had informed her after the incident was over that Bharwads were sitting at the shop. It was mentioned by this witness during cross-examination that on learning that Bharwads were quarrelling with her husband, she was not scared nor asked her husband to close the shop. According to her, several persons were coming to the shop for the purpose of purchasing articles and, therefore, she was not afraid of quarrel at all. It was also admitted by her that anonymous letter produced by the prosecution at Exh.13 was shown to her when her police statement was recorded.

13.2 This is all what transpires from the testimony of witness Ushaben. A fair reading of the testimony of witness Ushaben makes it evident that she has narrated the facts in a simple manner without noticeable exaggeration and/or embellishments. Her testimony does not suffer from any serious infirmity. The only omission which could be brought on record with reference to her police statement was regarding talk which she had with her husband when search of another accommodation at Ghogha circle was made by the deceased. Except that omission, nothing could be brought on record by the

defence to impeach her credibility. Her claim that when she had gone to the bus stand, she had found that her husband was sitting near the bus stand with one hand resting on the waist and another on head could hardly be demonstrated to be false. It is relevant to notice that the distance between the house of the deceased and the place where he was found sitting by this witness is hardly about 400 to 500 feet. The claim of the witness before the court that on learning about assault on her husband, she had left her house running deserves acceptance. As she had proceeded towards bus stand running, she must have reached near the bus stand within no time. Under the circumstances, her claim that she had made enquiry with her husband after sitting near him and that the deceased had made oral dying declaration before her involving the respondents inspires confidence of this court.

14. On scrutiny of the judgment impugned in the appeal, it becomes evident that the learned Judge has recorded three reasons for disbelieving testimony of witness Ushaben Chetumal in paragraph 10 of the judgment. The first reason given by the learned Judge is that according to the prosecution case, the deceased was assaulted when he was pulling down shutter of the shop but he was found lying near the bus stand and it is not explained by the prosecution as to how he had reached the bus stand. To say the least, this is complete misreading of evidence on record. Though complainant Khumansinh Jatubha examined at Exh.19 has not fully supported the prosecution case, his testimony shows that the first blow with dharia was inflicted on the deceased near his shop and, therefore, in order to save his life, the deceased had started running. Witness Ushaben Chetumal, in paragraph 6 of her testimony, has categorically stated that the place where she had found her husband sitting was at a distance of 150 to 200 feet from the shop which is a very small distance. It means that the distance was not so great which could not have been covered by the deceased after receipt of the first injury. Therefore, the learned Judge was not justified in coming to the conclusion that the prosecution could not explain as to how the deceased was found lying near the bus stand. Thus, the first ground which has weighed with the learned Judge of the Trial Court in disbelieving witness Ushaben Chetumal that the prosecution has failed to explain as to how the deceased was found lying near the bus stand is contrary to the weight of evidence on record and cannot be accepted.

14.1 The second ground which has weighed with the

learned Judge in disbelieving testimony of witness Ushaben is that after receipt of 47 injuries, the deceased must have been rendered unconscious and must not have been in a position to speak, as a result of which the claim made by witness Ushaben that her husband had made oral dying declaration before her involving the respondents becomes doubtful. It was also argued on behalf of the respondents that on receipt of 47 injuries, the deceased must have been rendered unconscious and must not have been able to say anything and, therefore, evidence tendered by witness Ushaben regarding oral dying declaration should be disbelieved. In this regard, it would be advantageous to refer to two decisions cited at the bar by the learned APP.

14.1.1 In PRAKASH AND ANOTHER VS. STATE OF MADHYA PRADESH reported in AIR 1993 SUPREME COURT 65, the appellant was convicted under Section 302 of I.P.C. His conviction was upheld by the Madhya Pradesh High Court. While supporting conviction, it was argued by the learned counsel for the State that dying declaration made by the deceased should not have been discarded by the learned Additional Judge because there was no evidence to warrant the finding that the deceased was not in a position to make a dying declaration. According to the learned counsel of the State Government, the deceased was alive for 30 to 45 minutes after the incident and the doctor who had treated the deceased in the hospital and had held post-mortem did not state that it was not possible for the deceased to make a dying declaration. While considering this plea, the Supreme Court has held that as the deceased was alive at least up to half an hour after the assault and as it was not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical, it was unlikely that he could not have made dying declaration. What is held by the Supreme Court is that in ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. According to the Supreme Court, in the case before it, there was no occasion to hold that the deceased was not in a position to identify the assailants because it was nobody's case that the deceased did not know the accused persons and, therefore, it was quite likely that on being asked, the deceased would name the assailants. Having regard to the facts of the case, the Supreme Court was of the opinion that the High Court was justified in accepting the dying declaration and the

finding recorded by the High Court on the point of dying declaration was not perverse and did not require to be interfered with by it.

14.1.2 Again, in *VISHRAM AND OTHERS vs. STATE OF MADHYA PRADESH* reported in AIR 1993 SUPREME COURT 250, the appellants were convicted under Section 302 read with Section 148 of I.P.C. The prosecution relied on the evidence of two eye-witnesses but they turned hostile. However, three witnesses deposed about the oral dying declaration made by the deceased to them. One of them was wife of the deceased. The Trial Court, relying on the dying declarations spoken by wife of the deceased and another witness, convicted the appellants. Incidentally, it also referred to some of the important admissions made by the two hostile witnesses. In appeal, the High Court, having considered the evidence of two witnesses before whom the dying declaration was made and also the admissions made by the witnesses in the cross-examination, reached the conclusion that the prosecution established the guilt of the respondents and accordingly, dismissed the appeal. In the appeal before the Supreme Court, it was argued that p.w.1 and p.w.5 were interested witnesses and on the basis of the oral dying declarations said to have been made to them by the deceased, the appellants could not have been convicted and that at any rate, it would be highly unsafe to convict them without strong corroboration which was not there. While dismissing the appeal, the Supreme Court has held that nothing significant had been elicited in the cross-examination of the two witnesses and the claim of wife of the deceased that she had reached the place of occurrence and found Chandra Shekhar lying unconscious but her husband Kamal Kishore was conscious and on being asked, he had told her that six appellants had attacked him and beat him was reliable as her evidence was not suffering from any infirmity. In the said case, it was noticed by the Supreme Court that the doctor who had examined deceased Kamal Kishore, on being cross-examined, had stated that ordinarily, injuries found on the head of Kamal Kishore could cause unconsciousness but it could not positively be said that they would have caused immediate unconsciousness. The Supreme Court has held that it must be noted that the doctor had not categorically stated that Kamal Kishore would have been unconscious immediately after receipt of injuries and could not have been in a position even to speak that much. Thus, the evidence regarding the dying declarations tendered by prosecution was relied upon by the Supreme Court and the appeal was dismissed.

14.1.3 Applying the principles laid down by the Supreme Court in above-quoted cases to the facts of this case, this court finds that the positive evidence led by witness Ushaben Chetumal, who is wife of the deceased, that she had made enquiries with her husband and that her husband had made oral dying declaration before her implicating the respondents cannot be brushed aside on the basis of the inference that on receipt of 47 injuries, the deceased must have been rendered unconscious immediately. The claim of witness Ushaben that when she had gone running towards the bus stand she had found her husband sitting with one hand resting on the waist and another on the head could not be shaken by the defence, though she was subjected to lengthy and searching cross-examination. Nothing significant has been elicited in her cross-examination which would show that the distance between her house and the place near the bus stand where she had found her husband sitting was more than 400 to 500 feet. Distance of 400 to 500 feet can hardly be regarded so great and a person of the age of witness Ushaben, if starts running, would cover such distance within no time. Thus, there is no manner of doubt that she had reached the place where her husband was sitting within no time. Though Dr. Bhanushanker Joshi was examined as one of the prosecution witnesses, no attempt was made by the defence to solicit his opinion whether a person would lose consciousness on receipt of 47 injuries or not. In fact, the said witness is not cross-examined by the defence at all. It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the injured must have been so critical that it was not possible for him to make a short dying declaration. In order to take assistance from oral dying declaration, the prosecution should, normally bring on record through trustworthy witness, the exact words uttered by the deceased. The exact words spoken by deceased Balwantrao have been brought on record through trustworthy evidence of witness Ushaben. Oral dying declaration proved through reliable testimony of witness Ushaben is consistent with medical evidence on record which establishes that deceased had sustained injuries which could have been caused by sharp cutting instruments. Evidence about oral dying declaration will have to be accepted when there is no other inconsistent evidence on record. In the ordinary course, the members of the family including wife were expected to ask the victim, the names of the assailants at the first opportunity and, therefore, the claim made by witness Ushaben that she had asked the victim as to what had happened and that her husband had given names of the respondents as his assailants inspires confidence of this

court and deserves to be accepted. The learned Trial Judge has raised an inference that on receipt of 47 injuries, the deceased must have been rendered unconscious. This court is of the firm opinion that such an inference was totally unwarranted and could not have been pressed into service for brushing aside or discarding positive, reliable and cogent evidence of witness Ushaben Chetumal.

14.2 The third ground which has weighed with the learned Judge in disbelieving testimony of witness Ushaben is that she had not stated in her police statement that deceased Balwantrao had informed her that he was not inclined to stay in the house wherein he was staying as he was threatened by the respondents no.2 and 3. Having considered the testimony of witness Ushaben minutely, this court is of the opinion that the above referred to omission has been blown out of proportion by the learned Judge. The prosecution evidence may suffer from inconsistency here and discrepancies there but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in their evidence. In the latter, however, no such benefit may be available to it. In the deposition of witnesses, there are always normal discrepancies and/or omissions, however, honest and truthful they may be. These discrepancies and/or omissions are due to normal errors of observation, normal errors of memory, due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and the like. Often certain facts get omitted to be stated when police statement is recorded and this is not uncommon. The facts of the present case indicate that gruesome murder of the deceased had taken place in the night of January 3, 1986 whereas police statement of witness Ushaben Chetumal was recorded on the next day i.e. on January 4, 1986. Witness Ushaben, who was then aged 22 years, having lost her husband, must have been shocked and stunned. In fact, she was so stunned and overtaken by grief that first information report regarding the incident was not lodged by her but by Khumansinh who was employed by her husband and who turned hostile to the prosecution. Therefore, it is but natural that all minute details could not have been stated by her in her police statement. Further, the omission which is noticed by the learned Judge of the Trial Court is insignificant and does not go to the root of the matter at all. Under the circumstances, this court is of the

opinion that the third ground which has weighed with the learned Judge in discarding testimony of witness Ushaben also cannot be sustained. The learned Judge has recorded only three reasons for disbelieving testimony of witness Ushaben and none of them is found to be acceptable. On the contrary, this court finds that the appreciation of testimony of witness Ushaben by the learned Judge of the Trial Court is contrary to well-settled basic and elementary principles of appreciation of evidence laid down by the Supreme Court in catena of decisions. Thus, this court finds that the learned Judge has, on wrong reasons, discarded reliable and cogent evidence of witness Ushaben which has led to complete miscarriage of justice.

15. This brings the court to consider the evidence tendered by the prosecution regarding discovery of weapons and clothes pursuant to disclosure statements made by the respondents. It is true that the panch witnesses, examined in support of discovery evidence, have not supported the prosecution and have turned hostile. The only reason assigned by the learned Judge for disbelieving the evidence regarding discovery is that the panch witnesses have turned hostile. It hardly needs to be stated that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution cannot be thrown overboard as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses, regardless of the evidence of independent witnesses, in theory, it would be giving a right of veto to the panchas which is not the concept of criminal jurisprudence at all. If a court finds that panch witnesses examined in support of discovery evidence have turned hostile, it should make an attempt to find out whether there is other evidence on record which substantiates discovery evidence and for this purpose, evidence of police officer must be referred to with advantage. So far as the question of culpability of an accused is concerned, if the evidence of police officer is otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas did not support the prosecution, it should not be made a ground to discard his evidence. This court notices that the learned Judge of the Trial Court has not considered at all the evidence tendered by the Investigating Officer

regarding discovery of weapons and seizure of clothes, pursuant to disclosure statements made by the respondents, and brushed aside the case of the prosecution regarding discovery of weapons and seizure of clothes pursuant to disclosure statements made by the respondents only on the specious ground that the panchas have not supported the prosecution. To say the least, the approach adopted by the learned Judge of the Trial Court is neither judicious nor warranted in the facts of the case and is contrary to basic principles of criminal jurisprudence. As the learned Judge has not considered the evidence of Investigating Officer at all, this court proposes to consider the same to find out whether the evidence regarding discovery of weapons and seizure of clothes tendered by him is reliable or not. In this regard, it would be relevant to refer to the testimony of witness Bhaskarrav Simpi who is examined as p.w.21 at Exh.47. His evidence would indicate that he was discharging duty as Police Inspector, Bhavnagar 'B' Division Police Station since January, 1986 and that, on receipt of telephonic message from constable Harichandra Mahipatsinh that the deceased was lying in a pool of blood near Bharatnagar bus stand, he had gone there. His evidence also shows that he had noticed a crowd of about 50 persons and that injured Balwantrai was not there and, therefore, an enquiry was made by him and it was learnt by him that Balwantrai was removed to Government hospital in a tempo. According to this witness, after posting a constable at the place where blood was found near Bharatnagar bus stand, he had gone to Civil Hospital and had learnt that the deceased had died. It is also clear from his evidence that at the hospital itself, he had learnt that a person named Khumansinh had gone to police station for the purpose of lodging F.I.R. and, therefore, he had gone to police station and recorded F.I.R. of Khumansinh. This witness has, in detail, described various steps which were taken by him during the course of investigation on January 4, 1986, January 5, 1986, January 6, 1986, January 7, 1986 etc. According to this witness, the respondent no.1 had surrendered before the police on January 6, 1986 and, therefore, his arrest panchnama was prepared in the presence of panch witnesses. It is stated by this witness that it was found that the respondent no.1 had injured his left hand over which a bandage was applied and, therefore, an enquiry was made by him with the respondent no.1 which revealed that he was injured with knife by respondent no.3. The witness has further mentioned in his testimony that the respondent no.1 had lodged a complaint against respondent no.3 for commission of offence punishable under Section 324 of I.P.C. which was registered by him

and investigated by him. This claim of the witness stands corroborated by documentary evidence on record such as Exh.48, Mark P/2 and Exh.59. His evidence also shows that on receipt of information that original accused nos.2 and 3 were near Valand society, he had gone there and arrested them in presence of panch witnesses regarding which a panchnama was prepared. According to this witness, while in police custody, the respondent no.1 had made a disclosure statement on January 7, 1986 and, therefore, he had summoned panch witnesses and prepared first part of the panchnama at the police station and also obtained signatures of the panch witnesses on the first part of the panchnama. It is asserted by this witness that thereafter, he, in the company of police officers and panch witnesses as well as respondent no.1, had proceeded in a jeep and that the respondent no.1 had taken them to his house situated in Bharatnagar. It is claimed by the witness that the respondent no.1 had taken out a knife from a cylindrical upright vessel of metal lying in his house and that the said knife was found to be blood-stained. What is asserted by the witness is that thereafter, the knife was seized and second part of the panchnama was prepared there on which the signatures of the panch witnesses were obtained. The witness has produced the said panchnama at Exh.15 and has also identified the knife which was discovered and produced before the court as Muddamal article no.7.

15.1 The testimony of this witness further shows that on January 7, 1986, the respondent no.3 had made a disclosure statement, as a result of which he had requisitioned services of two panch witnesses and prepared first part of the panchnama at the police station. The witness has mentioned in his testimony that thereafter, he, in the company of other police officers and the panch witnesses as well as respondent no.3, had proceeded in a jeep towards Mafatnagar where the respondent had led them to a thicket of babul plants and from there, he had taken out a sword without handle as well as a white 'chorni' and white shirt. The witness has clearly mentioned that all the three articles which were discovered were blood-stained and were, therefore, seized under the panchnama. It is also stated by the witness that second part of the panchnama was completed at that place and signature of the panch witnesses was obtained. The witness has produced the said panchnama at Exh.51. He had identified the sword as well as white 'chorni' and white shirt, discovered pursuant to disclosure statement made by respondent no.3, and which were produced before the court as Muddamal articles no.9,

10 and 11 respectively.

15.2 His testimony further shows that on January 8, 1986, the respondent no.2 had made a disclosure statement and therefore, he had requisitioned services of panch witnesses and prepared first part of the panchnama at the police station itself. According to this witness, he, in the company of police officers and the panch witnesses as well as the respondent no.2, had proceeded in a jeep towards a barren land situated near Thranmaliya, Bharatnagar and from thickets of 'Kerda', he had taken out a dharia, a shirt and a 'chorno'. According to this witness, the clothes and dharia discovered were blood-stained, as a result of which they were seized under a panchnama. What is mentioned by this witness is that second part of the panchnama was prepared at that very place and signatures of the panch witnesses were obtained thereon. The witness has produced the said panchnama at Exh.52 and also identified clothes and dharia discovered as Muddamal articles No.17, 18 and 19 which were produced before the court.

15.3 Though this witness has been searchingly cross-examined by the defence, nothing could be elicited which would make dent in the claim of this witness that blood-stained weapons and clothes were discovered pursuant to disclosure statements made by the respondents. The evidence of the witness stands corroborated by contemporary documents on evidence which are produced by him at Exhs. 50 to 52 and there is no good ground as to why the claim made by the Investigating Officer that weapons used in commission of crime and clothes put on by the respondents were discovered pursuant to disclosure statements made by them while in custody should be disbelieved, more particularly, when he has elaborately stated before the court as to how the investigation of the case had proceeded and is supported by documentary evidence on record. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. No ground could be pointed out by the learned counsel of the respondents as to why testimony of investigating officer should be discarded. It could not be even remotely suggested to the investigating officer that he was on inimical terms with any of the respondents or was interested in the deceased. Therefore, his testimony which is found to be cogent, consistent and trustworthy will have to be accepted. Under the circumstances, it is

held that discovery of weapons and clothes stands satisfactorily proved by the prosecution and the learned Judge of the Trial Court was not justified in discarding evidence tendered by the prosecution regarding discovery of weapons and clothes of the respondents on the ground that panch witnesses did not support the prosecution.

15.4 The prosecution has produced report of Serologist at Exh.18. It establishes that knife and T-shirt discovered by respondent no.1 as well as sword and shirt discovered by respondent no.3 and 'chorni' discovered by respondent no.2 had the same blood group as that of the deceased. As noticed earlier, Investigating Officer had seized control earth, chappals of the deceased, handle of the sword etc. while drawing panchnama of place of occurrence. This is quite evident from contents of panchnama of place of occurrence produced at Exh.29. the handle of sword seized was also forwarded to forensic science laboratory alongwith other articles including sword without handle discovered by the respondent no.2 and an opinion was sought whether handle and sword were parts of the same article. The report of the Serologist shows that they were parts of the same instrument. The find of same group of blood on weapons and clothes discovered by the respondents, as that of the deceased, would indicate that the respondents were in close proximity of the deceased when he was fatally wounded. Though sufficient opportunity was given to the respondents, they could not explain find of same group of blood as that of the deceased on weapons and clothes discovered by them. This fact also lends complete corroboration to the reliable testimony of witness Ushaben Chetumal. Under the circumstances, this court holds that the oral dying declaration proved by witness Ushaben Chetumal is genuine, truthful and reliable and, therefore, the acquittal of the respondents is totally unsustainable.

15.5 On reappraisal of evidence on record, this court finds that the impugned judgment is clearly unreasonable. Relevant and convincing materials have been unjustifiably eliminated by the learned Judge of the Trial Court. The view taken by the learned Judge is found to be manifestly wrong and has led to miscarriage of justice. On examination of the materials on record as well as reasons recorded by the learned Judge of the Trial Court for acquitting the respondents, this court is satisfied that the view taken by the learned Acquitting Judge is not only unreasonable but perverse and only one view on evidence is possible namely, that it is established by the prosecution beyond reasonable doubt

that the respondents had committed murder of deceased Balwantrao. This is not a case wherein two views are possible on a set of evidence. The acquittal of the respondents by the learned Judge of the Trial Court is found to be against the evidence and in disregard of the evidence and is also in violation of the basic principles of criminal justice. The appeal, therefore, will have to be allowed.

16. For the foregoing reasons, the appeal is allowed.

Judgment dated January 13, 1987 rendered by the learned Additional Sessions Judge, Bhavnagar in Sessions Case No.52 of 1986, acquitting the respondents of the offence punishable under Section 302 read with 34 of I.P.C., is hereby set aside. The respondents are convicted for commission of offence punishable under Section 302 read with 34 of I.P.C.. This court has heard the learned counsel of the parties regarding sentence to be imposed on the respondents. Having regard to the passage of time, this court is of the view that no case is made out by the learned APP for imposing capital punishment on the respondents and interest of justice would be served if each of the respondents is sentenced to suffer R.I. for life. As the court is inclined to impose minimum sentence provided under Section 302 of I.P.C., it is not necessary to hear them personally and, therefore, they have not been heard personally. Thus, for commission of offence punishable under Section 302 read with 34 of I.P.C., each respondent is sentenced to suffer R.I. for life. At this stage, the learned counsel of the respondents prays that having regard to the facts of the case, reasonable time to surrender be granted to the respondents. On the facts and in the circumstances of the case, time to surrender is granted to the respondents up to November 30, 2004.

( J.M. Panchal, J. )

( M.C. Patel, J. )

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